16-564

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~388.~~ 158

JOSEPH SPECHT, PLAINTIFF IN ERROR,

vs.

SAMUEL E. HOWARD, HENRY SANGER, MICHAEL SNOW, JAMES B. BRUSH, RICHARD BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED OCTOBER 31, 1871.

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## No. 368.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States for the 6th circuit, district of West Tennessee, at Memphis.

Be it remembered that, at a term of the circuit court of the United States for the district of West Tennessee, began and held at the Federal court-rooms in the city of Memphis, Tennessee, on the 4th Monday of November, in the year of our Lord one thousand eight hundred and seventy—the Honorable H. H. Emmons, judge of the circuit court of the United States in the 6th circuit for the district of West Tennessee, present and presiding—the following proceedings were had and appear of record in a certain cause, wherein Howard, Sanger & Co. are plaintiffs and Joseph Specht is defendant, to wit:

*Summons.*

The President of the United States of America to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon Joseph Specht, who is a citizen of the State of Tennessee, if he be found within your dis-
2 trict, to appear before the judge of the circuit court of the United States, in the 6th circuit for the district of West Tennessee, at Memphis, on the first Monday in March next, and then and there to answer Samuel E. Howard, Henry Sanger, Michael Snow, James B. Brush, and Richard Butler, parties under name and style Howard, Sanger & Co., of a plea of trespass on the case upon promises, to their damage ten thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday in September, in the year 1868, and 92d year of American independence.

A. S. MITCHELL, *Clerk.*
ISAAC MORRISON, *D. C.*

*Cost bond.*

Know all men by these presents that Howard, Sanger & Company and C. W. Metcalf held and firmly bound unto Joseph Specht, in the sum of two hundred and fifty dollars; to be void on condition that said Howard, Sanger & Co. do pay and satisfy all costs that may accrue
3 in that behalf in the prosecution of a suit this day commenced by them in the circuit court of the United States for the district of West Tennessee, at Memphis, against said Joseph Specht, on failure of the plaintiffs to prosecute this said suit with effect, or also on failure of the defendant, if convicted, to pay said costs.

Witness my hand and seal this 29th day of February, 1868.

C. W. METCALF. [SEAL.]

*Endorsement.*

Issued 29th day of Feb., 1868.

A. S. MITCHELL, *Clerk.*
ISAAC MORRISON, *D. C.*

Service acknowledged; returnable to March term, 1868, for trial.
McRAE & WALKER,
*Attorneys for Def'd.*

FEB. 29TH, 1868.

4 *Declaration.*

UNITED STATES OF AMERICA:

Circuit court of the United States for the sixth district of West Tennessee, at Memphis, March term, 1868.

Samuel E. Howard, Henry Sanger, Michael Snow, James B. Brush, and Richard Butler, who are citizens of the State of New York, and partners under the firm name and style of Howard, Sanger & Co., by attorney, complain of Joseph Specht, who is a citizen of the State of Tennessee, of a plea of trespass in the case upon promises.

1st. For this, that whereas heretofore, to wit, on the 22d day of September, 1866, at New York, certain persons, under the name and style of William Jehle & Bro., (not sued,) made and executed their certain promissory note in writing, (here to the court shown,) dated in New York the day and year last aforesaid, and thereby promised to pay, on the 11th day of December, 1866, to the order of the defend-
5 ant, the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, value received, with interest from the 11th day of October, 1866, and then and there delivered the same to the said defendant, who then and there, before the maturity thereof, endorsed and delivered the same to the plaintiffs. And the plaintiffs aver that afterwards, at the maturity of said note, diligent search and inquiry was made after the makers thereof, in the city of New York, in order that the same might be presented to them for the payment of the same, but they could not be found, nor any one to pay the same in their behalf; and the same was thereupon duly protested for non-payment, of which defendant had due notice; by reason whereof the defendant became liable to pay the said sum of money in said note specified, and, in consideration thereof, undertook and promised to pay the same whenever afterwards thereunto requested.

2. And also for this, that whereas heretofore, to wit, on the 22d day of September, 1866, at New York, certain persons, under the name and style of William Jehle and Bro., (not sued,) made and executed
6 their certain promissory note in writing, (here to the court shown,) dated at New York the day and year last aforesaid, and thereby promised to pay to the order of the defendant, on the 11th day of December, 1866, the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, value rec'd, with interest from the 11th day of October, 1866, and then and there delivered the same to the defendant, who then and there, before the maturity thereof, endorsed and delivered the same to the plaintiffs. And the plaintiffs aver that afterwards, at the maturity thereof, diligent search and inquiry was made after the makers of said note, in the city of New York, where, by agreement and understanding between the parties thereto and the plaintiffs, at the time of the making of said note, it was made payable, and where it was intended to be paid, in order that the same might be presented to the said makers thereof for payment, but they could not be found, nor any one to pay the same in their behalf; and the said note was thereupon duly protested for non-payment, of which defendant had due notice; by

7 reason whereof defendant became liable to pay to the plaintiffs the said sum of money in said note specified, and in consideration thereof undertook and promised to pay the same whenever afterwards thereunto requested.

3d. And also for this, that whereas heretofore, to wit, on the 22d day of September, 1866, at New York, certain persons, under the name and style of W'm Jehle & Bro., (not sued,) made and executed their certain promissory note in writing, (here to the court shown,) dated at New York the day and year last aforesaid, and thereby promised to pay, on the 11th day of December, 1866, to the order of defendant, the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, value received, with interest from the 11th day of October, 1866, and then and there delivered the same to the defendant, who, then and there, before the maturity thereof, endorsed and delivered the same to the plaintiffs. And plaintiffs aver that afterwards, at the maturity of said note, diligent search and inquiry was made in the city of New York for the makers of said note, in order that the same might be presented to them for

8 payment, but they could not be found, nor any one to pay the same in their behalf, nor did the said makers, or either of them, then, or have they since, paid, or cause' to be paid, the said sum of money, or any part thereof, except the sum of four thousand dollars, paid on the 31st day of December, 1866, all of which said premises the defendant had due notice. And plaintiffs aver that afterwards, to wit, on the day of February, 1868, after the dishonor of said note, and with a full knowledge of all the circumstances and premises and of the laches of the plaintiffs, and defendant's discharge as endorser, did promise to pay to the plaintiffs the balance due on said sum of money in said note specified; by reason whereof the said defendant became liable to pay to plaintiffs the said sum of money due on said note, and, being so liable, in consideration thereof, undertook and promised to pay the same whenever thereunto afterwards requested.

4th. And also for this, that whereas heretofore, to wit, on the 22d day of September, 1866, at New York, certain persons, under the name

9 and style of William Jehle & Bro., (not sued,) made and executed their certain promissory note in writing, (here to the court shown,) dated at New York the day and year last aforesaid, and thereby promised to pay, on the 11th day of December, 1866, to the order of the defendant, the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, value received, with interest from the 11th day of October, 1866, and then and there delivered the same to the defendant, who then and there endorsed an' delivered the same, before maturity thereof, to the plaintiffs. And the plaintiffs aver that afterwards, at the maturity of said note, diligent search and inquiry was made for the makers of said note in the city of New York, in order that the same might be presented to them for payment, but that they could not be found, nor any one to pay the same in their behalf, and the same was thereupon duly protested for non-payment, of which defendant had due notice. And plaintiffs further aver that, if such demand and notice were insufficient, yet, at the time of the making and endorsing of said note, and long before

10 the maturity thereof, and since, the defendant had, and now has, in his hands, or under his control, property and security sufficient to save him from any loss by reason of his said endorsement of said note, and which was furnished to him by the said makers before the maturity thereof, for the purpose of indemnifying and saving him harmless as such endorser thereon, and that defendant has not suffered any damage by reason of any insufficient demand or insufficient notice of the non-

payment of said note, by reason whereof he became liable to pay to plaintiffs the said sum of money in said note specified, and, being so liable, in consideration thereof, undertook and promised to pay the same whenever thereunto afterwards requested.

5th. And also for this, that whereas heretofore, to wit, on the 22d day of September, 1866, at New York, certain persons, under the name, firm, and style of William Jehle & Bro., (not here sued,) made and executed their certain promissory note in writing, (here to the court shown,) dated at New York the day and year last aforesaid, and thereby
11 promised to pay, on the 11th day of December, 1866, to the order of the defendant, seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, value received, with interest from the 11th day of October, 1866, and then and there delivered the same to the defendant, who then and there, before the maturity thereof, endorsed and delivered the same to the plaintiffs. And the plaintiffs aver that, at the time of the making of said note and endorsing of the same by defendant, and before the maturity thereof, and since, the defendants had in his hands, or under his control, and has ever since had, and now has, property and security sufficient to save him from any loss by reason of his said endorsement of said note, and which was furnished to him by the makers thereof for the purpose of indemnifying and saving him harmless as such endorser thereon; and the said defendant, by reason thereof, has not sustained any damage for, or by reason of, the want of demand of the makers thereof for payment, or want of notice of the non-payment of the same; by reason whereof the defendant became liable to pay to the
12 plaintiffs the said sum of money in said note specified, and, being so liable, then and there undertook and promised to pay the same whenever afterwards thereunto requested.

6th. And also for this, that whereas heretofore, to wit, on the 22d day of September, 1866, at, to wit, New York, certain persons, under the name and style of William Jehle & Bro., made their certain promissory note in writing, (here to the court shown,) and thereby promised to pay, to the order of Joseph Specht, the said defendant, on, to wit, the 11th day of December, 1866, seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, for value received, with interest from the 11th day of October, 1866, who then and there endorsed and delivered the same to the plaintiffs. And the plaintiffs aver that afterwards, when said note became due and payable, it was duly presented to the said makers for payment, according to the tenor and effect thereof, and the amount therein specified demanded, which was then and there refused, and of all which the said defendant had due notice; by reason whereof
13 he became liable to pay the amount specified in said note, and in consideration thereof undertook and promised to pay the same whenever afterwards thereunto requested.

7th. And also for this, that whereas heretofore, to wit, on the 14th day of December, 1866, the said defendant was indebted to the plaintiffs in the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, for money then and there lent by the plaintiffs to the defendant, at his special instance and request; and in the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, for money then and there paid and expended by the said plaintiffs for the use of the said defendant, at his special instance & request; and in the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, for money then and there received by the said defendant for the use of the plaintiffs; and in the sum of seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, for money then and there found to be due from the defendant to the plaintiffs on an ac-

14 count then and there stated between them; and in the sum of seventy-seven hundred and sixty-four $\frac{13}{100}$ dollars, for goods then and there sold and delivered to the defendant, at his instance and request; and thereupon the defendant afterwards, in consideration of the premises, respectively, then and there promised to pay the said several sums of money, respectively, to the plaintiffs whenever afterwards thereunto requested:

Yet, though the said several sums of money have long since been due, and although the said defendant has often been requested to pay the same, he has hitherto failed and refused, and still fails and refuses, to pay the same or any part thereof, to plaintiff's damage ten thousand dollars; wherefore they sue, &c., &c.

C. W. METCALF,
*Att'y for Plaintiffs.*

Filed Feb. 29th, 1868.

A. S. MITCHELL, *Clerk.*
ISAAC MORRISON, *D. C.*

15 *Plea.*

In the circuit court of the United States for the district of West Tennessee, March term, 1868.

HOWARD, SANGER & Co.
*vs.*
JOSEPH SPECHT.

And the said defendant, by attorney, comes and defends the wrong and injury, when, &c., and for plea says that he did not undertake, in manner and form as is above thereof alleged against him; and of this he puts himself upon the country, &c.

McRAE & WALKER,
*Atto'ys for Def'd.*

Joseph Specht makes oath that the above pleas are not interposed for delay, but are true in substance and fact.

JOSEPH SPECHT.

Sworn to and subscribed before me this 6th day of March, 1868.

ISAAC MORRISON,
*U. S. Commissioner.*

Filed 6th March, 1868.

A. S. MITCHELL, *Clerk.*
ISAAC MORRISON, *D. C.*

16 *Replication.*

HOWARD, SANGER & Co.
*vs.*
JOSEPH SPECHT.

And the said plaintiffs, as to the plea of the said defendant, by him above pleaded, and wherein he hath put himself upon the country, doth the like.

C. W. METCALF,
*Atto'y for Pl'ffs.*

Filed 9th Dec., 1868.

A. S. MITCHELL, *Clerk.*
ISAAC MORRISON, *D. C.*

And, on the 9th day of December, 1870, it being still a day of the November term, 1870, the following further proceedings were had:

HOWARD, SANGER & Co. } No. 787. Assumpsit.
*vs.*
JOSEPH SPECHT.

Came the parties, by their attorneys, and also the jury empanelled in this cause on yesterday, when, at the request of Smith Parks, one of said jury, and with the consent of both parties, said Smith Parks is excused from further service as a juror in the cause, and the trial to proceed with eleven jurors only.

And thereupon said trial was resumed; and there not being time to conclude said trial on to-day, the same is adjourned to to-morrow morning.

17 And, on the 10th day of December, A. D. 1870, it being one of the days of the November term of 1870, the following further proceedings were had, to wit:

HOWARD, SANGER & Co. } No. 787. Assumpsit.
*vs.*
JOSEPH SPECHT.

Came the parties, by their attorneys, and also the jury, as heretofore impanneled in this cause, when the trial of the same was resumed; and the jury having heard the evidence, the argument of counsel, and the charge of the court, and having retired to consider of their verdict, returned into court, and on their oath say they find for the plaintiffs, and assess their damages, by reason of the premises laid in the declaration, to four thousand seven hundred and eighty-one dollars and forty-four cents.

It is therefore considered by the court that plaintiffs recover of defendant the damages so assessed by the jury as aforesaid and the costs of this suit, and that execution issue.

And, on Monday, Dec. 12th, 1870, it being still a day of the November term, 1870, the following further proceedings were had:

HOWARD, SANGER & Co. } No. 787. Assumpsit.
*vs.*
JOSEPH SPECHT.

18 Came the parties, by attorneys; and thereupon defendant entered his motion for a new trial herein, which was continued for consideration on a future day of the term.

HOWARD, SANGER & Co. } No. 787.
*vs.*
JOSEPH SPECHT.

Came the parties, by attorneys; and thereupon comes on to be heard

the def't's motion for a new trial, herein entered on a former day of the term, which, being argued by counsel, and fully understood by the court, it is considered by the court that said motion be disallowed.

*Bill of exceptions.*

HOWARD, SANGER
*vs.*
JOSEPH SPECHT.

At the opening of the trial it was announced by council for plaintiffs and def'd. that no question was or would be made upon the pleadings.

NOTE.—Plaintiffs read the note, endorsement, and certificate of protest as follows:

$7,764 18.] NEW YORK, *Sep.* 22, 1866.

19 On Dec. 11th, 1866, we promise to pay, to the order of Joseph Specht, seventy-seven hundred and sixty-four $\frac{18}{100}$ dollars, value received, with interest from Oct. 12th, 1866.

WILLIAM JEHLE & BRO.

No. 473. Due Dec. 11–14.

[Rev. stamps, 2 26.]

(Endorsed:) Joseph Specht.

Cr. Dec. 31st, 1866..... $4,000 00

STATE OF NEW YORK,
*United States of America:*

I, Charles A. Davidson, notary public, duly commissioned and sworn, dwelling in the city of New York, do hereby certify that, on the fourteenth day of December, in the year of our Lord one thousand eight hundred and sixty-six, at the request of Messrs. Howard, Sanger & Co., the original note hereunto annexed was taken by me, and diligent search and inquiry made for the makers in said city of New York, but they could not be found, nor any one to pay the same on their behalf, and payment thereof demanded, which was refused.

[Rev. stamps 25 cts.]

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well
20 against the makers and endorsers of the said note as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interest already incurred and hereafter to be incurred for want of payment of the said note.

In testimonium veritatas.

[SEAL.]

C. A. DAVIDSON,
*Notary Public, for Mercantile National Bank.*

*Endorsement on protest.*

Protest. 7,764 18. Note of W'm Jehle & Bro., for Howard, Sanger & Co., dated Dec. 14th, 1866. Joseph Specht, Memphis, Tenn., as evi., and also a duplicate to Howard, Sanger.

Fees, 75 c't's; postage, 10; notice, 50; U. S. rev. s., 25—$1 60.

S. R. Johnson, a witness for the plaintiffs, deposed that, at the time of the maturity of the note in suit, he was a notary public, residing in New York City; that on the 15th day of December, 1866, he deposited, in the post-office of New York City, before the departure of any mail, and addressed to def't, at Memphis, Tennessee, the following notice.

NEW YORK, *Dec. 14th*, 1866.

21 Please to take notice that a promissory note made by W'm Jehle & Bro., due to-day, for $7,764 18, dated September 22d, 1866, endorsed by you, having been presented and payment thereof demanded and refused, is protested for non-payment, and that the holders look to you for payment thereof.

Your obedient servant,

CHA'S A. DAVIDSON,
*Notary Public, for Mercantile Bank.*

Plaintiffs then offered to read the depositions of Samuel E. Howard and Jason A. Lodwick and a letter of the makers, which is exhibited with the deposition of Howard addressed to the plaintiffs; and plaintiffs' council, being asked by the court for what purpose said evidence was offered, replied that it was for the purpose of showing that, by the acts, understanding, directions, or conduct of the makers, the plaintiffs were induced or led to make presentment of the note for payment in New York, and exercised due diligence in making presentment there and giving notice therefrom, notwithstanding the fact that the makers, at the time of the execution and maturity of the note, resided in Memphis, Tenn.

22 Def't excepted to the testimony, upon the ground that it evidenced a cotemporaneous parol agreement between the makers and the plaintiffs, unconsented to by def't, to make New York, by the terms of the note, and as part thereof, the place of payment thereof; but the exception was overruled and the evidence admitted, for the purpose, as above stated, of showing that plaintiffs exercized due diligence in making presentment in New York.

Thereupon plaintiffs read the deposition of Samuel E. Howard, one of the members of the plaintiffs' firm, to the effect that plaintiffs have resided and done business in the city of New York since the 9th of June, 1866; that the note in suit was made, endorsed, and delivered in New York; that said note was given in renewal, at the request of the makers of a note made and endorsed by the parties to this note, dated June 9th, 1866, due at four months, with interest from date, and payable in New York; that this first note was given in liquidation of an open account for goods sold by plaintiffs to the makers thereof; and to the following interrogatories and cross-interrogatories said witness answered as follows:

Interrogatory 2d. Examine the promissory note marked "Exhibit A," herewith, and make the same an exhibit to your deposition, and state what you know about the execution of it; that is, where the same was made and delivered and to whom.

23 Ans. The promissory note hereto annexed, marked "Exhibit A," was made and signed by W'm Jehle, at the office of Howard, Sanger & Co., in New York, on or about the 22d day of September, 1866, and was taken by said Jehle to Joseph Specht, whom he stated was in New York, and said note was delivered by said Jehle to my firm at their office in New York the same day, endorsed by Joseph Specht.

Interrogotory 3d. At the time of the making thereof, was there any agreement or understanding on the part of the makers thereof, or any of the parties thereto, as to the place of payment of the same?

Ans. Yes; the makers and our firm, and our book-keeper, who drew the note, all understood the place of payment of the note to be New York City.

Interrogotory 4th. If you answer yea, state where that place of payment was and the agreement or understanding in respect thereto.

24 Ans. The place of payment of the note was to be New York, in order that Howard, Sanger & Co. might have the note discounted at bank, if they needed the money before its maturity; this was understood by the makers and our firm, and was so stated at the time.

Interrogotory 5th. If there was no positive agreement as to the place of payment, state whether or not there was anything said or done by the makers to induce the holders to expect and to demand payment of the same of the makers in the city of New York.

Ans. There was a positive agreement that the place of payment of the note should be New York City, where they had made their previous payments; and that it was so understood by the makers will be seen by letters of W'm Jehle & Bro., hereto annexed, marked "Exhibit B," dated Memphis, Dec. 10th, 1866, before maturity of the note.

Cross-interrogotory 4th. If you undertake to say that anything was done by the makers of said note to induce you to expect and de-

25 mand payment in New York, state fully what that inducement was, when and where it occur'ed, and who was present.

Ans. We were induced to expect and demand payment of the note in New York City, because it was expressly understood between the makers and ourselves that the note was to be paid in New York City, and that it could be discounted, if necessary, at bank, without any deduction for collection or exchange. This understanding took place at our office on the day the note was made and delivered, as I have stated. Jason A. Lodwick, our book-keeper, was present.

At the time of the execution and maturity of the note in suit, the makers and the def't resided in Memphis, Tenn. Witness exhibited with his deposition the following letter.

MEMPHIS, TENN., *Dec. 10th*, 1866.

Messrs. HOWARD, SANGER & CO., *New York.*

GENTLEMEN: From present indications I fear very much that

26 we will not be able to meet our note due on the 11–14. We have still hope to make it before the last day, and are straining ourselves to do so. We of course do not expect that you will listen to any more of our apologies, but you have treated us with great leniency so far, but the short crop has caused a general stagnation in trade, and is beyond our control. If we should fail to remit when due, we will certainly do so at once after the Christmas sales.

Yours truly,

W'M JEHLE & BRO.

Plaintiffs then read the deposition of J. A. Lodwick, to the effect that, at the time of the execution of the note in suit, witness was book-keeper for plaintiffs; that said note is in his handwriting; that it was

27 drawn and handed by witness to W'm Jehle, one of the making firm, who signed the same as W'm Jehle and Bro., and stated

that he would take it to def'd. Specht, who was in New York, for endorsement; that said Jehle brought the note back endorsed by def'd. Specht, and delivered it the same day; that the note in suit was given in renewal, as deposed by witness Howard; and to the following interrogatories and cross-interrogatories the witness Lodwick answered as follows:

Interrog. 5th. Was or was not anything said by the makers of said note, marked A, as to its place of payment, at the time the same was being executed, or at any time during negotiations for its being taken in renewal of the old note, or at any time thereafter?

Ans. It was understood and agreed between William Jehle and
28 Howard, Sanger & Co. and myself that the note marked "Exhibit A" was to be paid in New York City.

Interrog. 6. If yea, state what was said about its place of payment; where was it agreed, or understood, or intended to be made payable; what conversation, if any, occurred thereabouts, and between whom; and state fully all that was said or done.

Ans. At the time I drew the note, Mr. Jehle stated to me that he would pay the note in New York, and asked to have it so drawn.

Interrog. 7th. Was or was not the said note drawn (if drawn by you) according to instructions of the maker, or according to the intention and understanding of the parties; if not, in what respect does it differ? State how it happened.

Ans. The note was drawn under instruction from W'm Jehle and Howard, Sanger & Co.; that the same was to be made payable in New York; and if not so drawn, it was a clerical error on my part.

29 Cross-interrog. 2d. If you state any agreement concerning the note in question, state when and where it was entered into, between what persons, and who was present.

Ans. The agreement as to the place of payment of the note in question was made in the office of Howard, Sanger & Co., 105 Chambers street, New York, by W'm Jehle and Henry Sanger and Michael Snow, (two of the firm of Howard, Sanger & Co.,) in my presence, and was assented to also by Samuel E. Howard, another member of said firm.

Cross-interrog. 3d. If you state anything concerning any understanding, or agreement, or intention of the parties to said note as to its place of payment, state explicitly whom you mean by the parties.

Ans. I have stated that the place of the payment of the note was understood to be New York City by the makers of the note and the firm of Howard, Sanger & Co.

It was proved by plaintiffs that, at the time of the execution of the notes referred to, *that* W'm Jehle was the husband of def'd's neice and adopted daughter, and that, at the time of the maturity of the note, said W'm Jehle and family were living with defendant.

30 Def'd. thereupon offered to testify that he did not consent to the agreement to make New York the place of payment of the note in suit, but that, on the contrary, he expressly declared to the makers that he would not again endorse a note payable in New York, the def'd. stating, however, that he would not be able to prove that plaintiffs had any knowledge of his said declaration, which evidence was rejected; to which def'd. excepted.

Def'd. then requested the court to rule that the plaintiff's testimony evidenced a material alteration of def'd. contract of endorsement, and that def'd. was thereby immediately discharged from liability; which ruling was refused, def'd. excepting. The court, however, upon further

consideration, withdrew from the jury so much of the plaintiff's testimony as related to the parol agreement aforesaid, and adjudged the def'd. discharged, for the reason that the demand and notice put in evidence by the plaintiffs were insufficient to fix his liability.

To the said action of the court, withdrawing said evidence from
31 the jury, the defendant excepted.

Plaintiffs then put in evidence a promise made by def't, subsequent to the maturity of the note, to pay the same, and also a knowledge, upon the part of def'd. at the time of such promise, of the facts of the defective demand and notice, by which he was discharged from liability, upon which evidence, and the charge of the court thereupon, to neither of which were any exceptions taken, the case was put to the jury, and a verdict found for the plaintiffs.

Defendant's motion for a new trial being overruled, he tendered this his bill of exceptions, which was signed, sealed, and made part of the record.

H. H. EMMONS, *Circuit Judge.*

32 Know all men by these presents that we, Joseph Specht, as principal, and A. Vaccaro and C. A. M. Yarbra, as sureties, are held and firmly bound unto Samuel E. Howard, Henry Sanger, Michael Snow, James B. Brush, and Richard Butler, partners under the style of Howard, Sanger & Co., in the sum of nine thousand one hundred and sixty-two dollars, to be paid to the said Howard, Sanger & Co., their executors and administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, and dated this 15th day of December, A. D. 1870. The condition of this obligation is such, that whereas, on the 10th day of December, 1870, the said Howard, Sanger & Co., in the circuit court of the United States for the district of West Tennessee, obtained a judgment against said Joseph Specht, to reverse which judgment the said Specht hath prosecuted a writ of error to the Supreme Court of the United States: Now, therefore, the condition of this obligation is such, that if the said Joseph Specht shall prosecute his said writ of error to effect, and answer
33 all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOSEPH SPECHT. [SEAL.]
A. VACCARO. [SEAL.]
C. A. M. YARBRA. [SEAL.]

Approved:

CONOLLY F. TRIGG,
*U. S. District Judge.*

Filed 15th Dec., 1870.

ISAAC MORRISON, *D. C.*

34 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the sixth judicial circuit and western district of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between Samuel E. Howard, Henry Sanger, Michael Snow, James B. Brush, and

Richard Butler, plaintiffs, and Joseph Specht, defendant, a manifest error hath happened to the great damage of the said Joseph Specht, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all
35 things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the fourth day, being the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this 9th day of October, A. D. 1871.

[SEAL.] HORACE E. ANDREWS,
*Clerk U. S. Circuit Court for the Dist. of West. Tenn.*

36 UNITED STATES OF AMERICA, *ss:*

To Samuel E. Howard, Henry Sanger, Michael Snow, James B. Brush, Richard Butler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Tennessee, at Memphis, wherein Joseph Spec't is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. H. Emmons, circuit judge of the United States for the sixth judicial circuit, this ninth day of October, in the year of Lord, 1871.

H. H. EMMONS,
*Circuit Judge.*

Circuit court of the United States for district of West Tennessee.

37 Before me, H. E. Andrews, clerk of the circuit court aforesaid, personally appeared S. P. Walker, who, being duly sworn, says that he executed this citation by leaving with C. W. Metcalf, the attorney of record of the defendants in error, a full and true copy of the same, this 9th day of October, A. D. 1871.

S. P. WALKER.

Sworn to and subscribed before me this 10th day of October, A. D. 1871.

HORACE E. ANDREWS, *Clerk.*

38 UNITED STATES OF AMERICA,
*District of West Tennessee:*

I, Horace E. Andrews, clerk of the circuit court of the United States for the district of West Tennessee, do hereby certify that the foregoing pages, from 1 to 37, inclusive, contain a full and true copy of the records

and proceedings of said court, in the case of Howard, Sanger & Co. vs. Joseph Specht, as the same appear of record and file in my office.

Witness my hand and the seal of said circuit court of the United States for the district of West Tennessee.

[SEAL.] HORACE E. ANDREWS, *Clerk.*

(Indorsement on cover:) No. 368. Joseph Specht, plaintiff in error, vs. Samuel E. Howard, Henry Sanger, Michael Snow, James B. Brush, Richard Butler. W. Tennessee C. C. U. S. Filed 31st October, 1871.

O

# SUPREME COURT OF THE UNITED STATES

**NO. 388.**

*JOSEPH SPECHT, Plaintiff in Error,*
*vs.*
*HOWARD, SANGER & CO.,*
*Defendants in Error.*

## ABSTRACT AND POINTS FOR PLAINTIFF IN ERROR,

BY D. K. McRAE.

—IN THE—

# SUPREME COURT OF THE UNITED STATES.

NO. 368.

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*JOSEPH SPECHT, Plaintiff in Error,*
*vs.*
*HOWARD, SANGER & CO.,*
*Defendants in Error.*

This suit was brought by defendants in error against the plaintiff in error as the accommodation endorser of a promissory note, made by Wm. Jehle & Bro., for $7,764 18, dated New York, September 22, 1866, and due on December 11, 1866. The note was payable generally.

The makers, Wm. Jehle & Bro., and the plaintiff in error, at the time of the making and maturity of the note, resided in Memphis, Tennessee. At maturity the note was protested in New York, without personal demand upon the makers, or either of them.

Upon the trial the defendants in error, admitting the protest to be fatally defective, undertook to cure the defect by proof of an agreement

between the holders, Howard, Sanger & Co., and the makers, (but unknown to, and unconsented to by the endorser,) by which the note was payable in New York.

Plaintiff in error objected to this testimony, because it sought to bind him by a contract to which he was not a party. The evidence was admitted.

"Defendant then requested the Court to rule that the plaintiff's "testimony evidenced a material alteration of defendants' contract of "endorsement, and that defendant was thereby immediately discharged "from liability; which ruling was refused, defendant excepting. The "Court, however, upon further consideration, withdrew from the jury "so much of the plaintiff's testimony as related to the parol agreement "aforesaid, and adjudged the defendant discharged for the reason that "the demand and note put in evidence by the plaintiff were insufficient "to fix his liability. To said action of the Court withdrawing said "evidence from the jury, defendant excepted."

Record 10, 11.

## POINTS.

1. The plaintiff's evidence showed a material alteration of defendants' contract, unconsented to by him, and by which he was ipso facto discharged.

Pearson vs. Bank of Metropolis, 1 Pet., 89.
Woodworth vs. Bank of America, 19 Johns., 391.
Covington vs. Comstock, 14 Pet., 43.

2. The objection that the agreement between the principals, altering the contract, was in parol and contemporaneous with the written contract, could not be made by the plaintiffs below, they having themselves put the parol agreement in evidence.

2 Phillips' Evidence, 684, note 497.
2 Lead., Cas. in Eq., 685.
Shaw vs. Stone, 1 Cush., 243.
Decker vs. Bryant, 7 Barb., 189.
Esmay vs. Gorton, 18 Ill., 483.
Buckley vs. Bentley, 48 Barb., 287.

N York v Carbear 38 N.Y. 111.

3. Proof of the parol agreement as to the place of payment was competent, had it been offered as original evidence by the endorser, for the purpose of discharging himself.

Chitty on Contracts, 459.
Wattriss vs. Pierce, 32 Conn., 577.
McWilliams vs. Mason, 6 Duer (N. Y.), 276.
2 Phillips' Evidence, 650, note 487.

In which connection the proof offered by the defendant below, to the effect "that he did not consent to the agreement to make New York "the place of payment of the note in suit, but that, on the contrary, he "expressly declared to the makers that he would not again endorse a "note payable in New York," was competent, and should have been admitted.

D. K. McRAE,

*for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES.

**NO. 368.**

*JOSEPH SPECHT, Plaintiff in Error,*
*vs.*
*SAMUEL E. HOWARD, HENRY SANGER, MICHAEL SNOW, JAMES B. BRUSH, and RICHARD BUTLER.*

*In Error to the Circuit Court of the United States for the District of West Tennessee.*

## ARGUMENT FOR PLAINTIFF IN ERROR,

By D. K. McRAE.

BOYLE & CHAPMAN, PRINTERS, MEMPHIS, TENN.

# In the Supreme Court of the United States,

NO. 368.

---

*JOSEPH SPECHT, Plaintiff in error,*
*Against*
*HOWARD, SANGER & CO., Defendants in error.*

This suit was brought against the plaintiff in error as the accommodation indorser of a promissory note.

The facts are these: Wm. Jehle & Bro., a firm, resident and doing business in Memphis, Tenn., were indebted on the 9th day of June, 1866, to Howard, Sanger & Co., a firm resident and doing business in New York, in the sum of $7,764 18 by open account, which account they closed by their note at four months, indorsed for their accommodation by the plaintiff in error, Joseph Specht. This note was on its face payable in New York city.

About a month before its maturity, Wm. Jehle, one of the makers, and the plaintiff in error being in New York, Jehle applied for, and Howard, Sanger & Co. agreed to give further time.

The note in suit was accordingly drafted in the office of Howard, Sanger & Co., signed by Wm. Jehle, in the name of Wm. Jehle & Bro., and by him taken to procure the indorsement of the plaintiff in error, who was also a resident of Memphis. The indorsement was procured, and the note returned to the defendants in error, in its present form. This renewal note (the note in suit) is payable generally.

Record 7, 8.

It matured without payment, and was protested in New York without personal demand upon the makers, or either of them.

Record 7.

In order to remedy this fatal defect in the protest, the defendants in error proved, by the testimony of one of themselves, and the bookkeeper of their firm, that at the time of the execution of the note in suit, it was agreed between Wm. Jehle and the defendants in error that this note, like the one of which it was given in renewal, should be payable in New York, and the omission to make it so payable was the

mere mistake and oversight of the draftsman, the book-keeper referred to.

Record 8.

It is not pretended that the indorser consented to, or had any knowledge of the agreement to make the note payable in New York. On the contrary, the plaintiff in error offered to prove that a short time previous to the execution of the note in suit, in a conversation with Wm. Jehle, he had communicated to Jehle his intention not to indorse another note payable in New York.

Record 9, 10.

The Court below held the protest insufficient to charge the indorser for want of a proper demand, upon which a trial was had before the jury, upon the question of a subsequent promise to pay by the indorser, with a knowledge of the defective demand by which he was discharged. A verdict was found for the plaintiffs below, without exceptions by either party, on this branch of the case.

To reverse the judgment of the Court below, the plaintiff in error relies upon the proposition that that Court erred in refusing to rule that the agreement to make the note payable in New York, unconsented to by him, *ipso facto* discharged him; and that it erred in withdrawing from the jury the evidence on that point, thus refusing to let him go to the jury, upon the question of his absolute discharge, by force of the agreement.

It is true that the Court held that the agreement, unconsented to by the indorser, *did not make good the protest in New York.* But it refused to hold that it worked such an alteration of the indorser's contract as *ipso facto* to discharge him; and refused to let the defendant go to the jury upon that question, upon the evidence already in.

The plaintiff in error was a mere surety in the transaction, and I insist that the agreement between the principals unconsented to by him, to make the note payable in New York, immediately and absolutely discharged him.

It will be observed that the agreement was entered into cotemporaneously with, and as part of the same transaction in which the note in suit was executed and delivered.

Record 9, 10.

And that its purport was to render this note the same in terms as that for which it was given in renewal. There can be no doubt, therefore, that the agreement was supported by a sufficient consideration, to-wit: the surrender and cancellation of the old note.

It related to a material part of the contract evidenced by the note. This Court has more than once decided that the place of payment was a material part of a note.

Sebree vs. Dorr, 9 Wheat., 558–562.
Covington vs. Comstock, 14 Pet., 43.

In the case of Dobbin and Evans vs. Bradley, 17 Wend., 422, the defendant had written a letter agreeing to become responsible to the amount of five thousand dollars for advances to be made to one Andrew Smith, said Smith's paper therefor, to be made payable at the United States bank in Washington. The plaintiffs made the advances to Smith, and took his paper therefor, in all respects as prescribed by the letter, except that it was payable generally. *Held* a material departure from the conditions imposed by guarantor, and that he was not bound.

In Sturgis and Hale vs. Williams, 9 Ohio N. S., 443, the action was against the defendant as indorser of a promissory note. It appeared that the note was drawn and signed by the maker, payable generally, and carried to the indorser, who indorsed it for the accommodation of, and returned it to the maker. Application being made to the plaintiffs to discount the note, they required before doing so that it should be made payable at their own office. The maker thereupon wrote into the body of the note, and over his signature, "payable at the office of Sturgis & Hale." *Held* that the alteration was material, and the indorser immediately and absolutely discharged. This case is not decided upon the ground of a spoliation of the instrument; no allusion is made to that doctrine. The decision is rested solely on the materiality of the alteration.

I think there can be no question, therefore, that if the agreement, as proven, had been put in writing, either upon the note or elsewhere, that the indorser would have been instantly discharged. I call attention again to the terms of the agreement. It consisted not merely in a collateral agreement to have the funds in New York with which to pay the note—not in an authority merely to the holders to have presentment for payment made in New York (as some of the cases hold the maker may do without the consent of the indorser and so as to bind him), but it was a "positive agreement" that the note should, *by its terms and on its face* be payable in New York. The book-keeper of the defendants in error testifies that he was so instructed to draw it, and one of the defendants in error that such was the "positive agreement."

That the oral agreement was part and parcel of the written contract, and not a mere collateral understanding, is certain, for it was entered into in order that the note "could be discounted, at bank, *without any* "*deduction for collection or exchange.*"

Record 9.

And the record positively excludes the idea that this oral agreement as to the place of payment was abandoned by the parties to it. For,

upon the trial of the case, the plaintiffs below finding that the protest was fatally defective undertook to make it good by proof of a valid agreement, subsisting at the maturity of the note that it was payable in New York. And to show that the makers so understood it, they offered the letter on page 9 of the record, written by the makers of the note four days before its maturity.

The only remaining question therefore is, whether the evidence, being in parol, could be considered for the purpose of showing such an alteration of the endorser's contract as discharged him from liability. His Honor, the Circuit Judge, was of opinion that the agreement could not be used *for that purpose*, because the defendants in error, in offering evidence of the agreement, had declared that it was offered by them for another and different purpose, and because such a use of the testimony would violate the rule forbidding the variation of written contracts by parol evidence.

In this I think he erred.

1. The rule forbidding the variation or control of written contracts by parol evidence, is a rule of evidence merely, and not a rule of property, nor of the validity of contracts. It applies as well to contracts without as to those within the statute of frauds.

2 Phillips Evidence, 684, note 497.
2 Lead. Cas. in Eq., 685.

It is a rule for the prevention of false and indefinite evidence, and based upon the presumption that the parties to a written contract have, by the writing, fully expressed their contract. It is a presumption of fact only, forbidding *the admission* of the parol evidence.

Therefore, if both parties consent to its introduction, or if it is introduced by him against whom it is sought to be used, no objection can arise. "As the rules of evidence are made for the security and "benefit of parties, all exceptions may be waived by mutual consent; "and, in each particular case, an objection may be waived by the party "who has a right to except. Now, when this species of evidence "(parol evidence to vary a written contract) was offered by Stone and "others, in order to prove what was the agreement and understanding "of the parties, even though it might have been open to the exception "stated, the defendants *waived their exception by offering it*, and the "other party waived theirs by not excepting to its admission."

Shaw, C. J., in Shaw vs. Stone, 1 Cush., 243.

After evidence is already in, and put in by the defendants in error themselves, it is too late for them to invoke the aid of a rule affecting only *the admissibility* of testimony.

2. Nor could the fact that the defendants in error introduced evi-

dence of the oral agreement for the purpose of validating the protest in New York affect the right of the plaintiff in error to use it for his own discharge.

This very question arose in the case of Decker vs. Bryant, 7 Barb., 189. In that case the plaintiff, finding that certain incompetent testimony, introduced by himself, damaged rather than benefitted his case, sought to withdraw it from the case. The Court, in answer to his proposal to withdraw the testimony, says:

"For the purposes of the trial the party had made his election upon "what evidence he would rely; and it would be singular indeed if at the "close of the trial of a cause a party could select from the evidence "introduced by himself such parts as he deemed favorable and exclude "the residue from the consideration of the jury. Before the evidence "is given, it is within the control of the party. Once given, it belongs "to the cause and is the common property of all the parties. . . . "Having once put them (certain documents) in evidence he could not "withdraw them upon finding they would not answer his purposes."

I insist, therefore, that the parol agreement, being put in evidence by the defendants in error, was entitled to the same effect as if it had been in writing; that being in, it was in for all the purposes of the trial, and that the effect of it was to discharge the plaintiff in error from liability.

That the introduction by the plaintiffs below of the parol agreement was a complete waiver of the rule forbidding additions to or variations of written contracts by parol testimony, appears still more clearly if we suppose for a moment that the same evidence introduced by the plaintiff below had been offered by the defendant and admitted *without objection* from the plaintiff. The difficulty of proving the alteration would have been instantly removed. It consisted solely in the defective *evidence* of the alteration, objection to which must be taken at the time the evidence is offered. And if the objection be waived, expressly or tacitly, facts so proven must be treated as any other *proven facts*. The defect in the evidence is cured by the waiver. The failure to object is an abandonment of the rule of evidence referred to, by the assertion of which the party might have protected himself. The proposed evidence thereby becomes competent, and the only question left is as to its sufficiency.

Esmay vs. Gorton, 18 Ill., 483.

It is no answer to this reasoning to say that the proof being in, it only showed a parol cotemporaneous addition to and alteration of the written contract, which is in law no addition or alteration. It *is* an alteration, valid and binding, only it is defectively evidenced. All objections to evidence must be taken in limine.

Turner vs. Yates, 16 How., 14.

If not so taken, the truth of the fact proposed to be proven is alone in issue. *The failure to object is in legal effect a consent that the party may prove the fact by that character of evidence if he can.* When proven, it is too late to say that, after all, a mere parol alteration is shown.

There can be no doubt that if, in an action on this note against the makers, they, conceiving it to be to their advantage, had sought to prove the parol agreement as to the place of payment, the proposed proof would have been open to objection. But if the plaintiffs submitted to it without objection it would come too late for them to urge, on the argument of the case, that a written contract *cannot* be varied by parol. Flora vs Carbear 38 N.Y. 111.

So, upon the trial of this case, the evidence being in by the act of the plaintiffs themselves, the fact of alteration stood proven by competent testimony.

The distinction is clear between objections to the competency of testimony and questions relating to the consequences in law properly flowing from the facts when proven. The former must be made and settled in limine; the latter are for after consideration.

The rule excluding parol evidence is "a rule of evidence, applicable (only) to *the mode of proving a fact.*"

Buckley vs. Bentley, 48 Barb., 287.

2. Proof of the parol agreement as to the place of payment was competent had it been offered as original evidence by the indorser for the purpose of discharging himself. It is broadly stated by the text-writers that "a private agreement between the creditor and the prin-"cipal for a variation in the terms of their contract is a fraud on the "surety, and no liability on his part attaches."

Chitty on Contracts, 459.

According to the circumstances of each particular case, the surety is declared discharged because the identity of the contract upon which he became liable is lost (9 Wheaton 680, Miller vs. Stewart), or upon the ground of actual or constructive fraud.

Chitty on Contracts, ante.
Wattriss vs. Pierce, 32 Conn, 577.

And upon the ground of fraud, actual or constructive, the rule forbidding the variation of written contracts by parol is held not to apply in such cases.

McWilliams vs. Mason. 6 Duer (N. Y.), 276.

The cases on this subject are very numerous, but as I have found none exactly similar to the one in hand, I see no good end to be accomplished by citing a mass of them.

The general principle that a variation of the terms of the contract, by

the principals, discharges the surety will not be questioned; nor will it be denied that if the agreement here proven had been in writing, it would have had that effect. The only difficulty, therefore, is in the fact that the variation is in parol, the contract in writing. And in an action against the principal debtor, this difficulty, if properly insisted upon, would be insuperable; the law presuming, conclusively, that the writing expressed the entire contract, and that all cotemporaneous understandings or agreements were abandoned; of course proof is not allowed to show that they were not abandoned.

I concede that ordinarily, and as a mere question of evidence, the same presumption of abandonment might be indulged against a surety who was a co-obligor upon the same instrument with his principal.

But, in a case like the present, in which it is shown affirmatively, in behalf of the surety, that the agreement was not abandoned—that it was adhered to and acted upon by the holders, at the maturity of the note—that the makers acknowledged it to be subsisting and binding only four days before its maturity—it seems to me that the agreement was at least constructively fraudulent as to the surety; and that the rule of evidence, therefore, cannot apply. In such a case, to allow the creditor to intrench himself behind the rule would be monstrous. Injury to the surety, or its absence, has nothing to do with the principle involved; nor has the slightness of the variation. If allowed to the extent practiced in this case, there is no limit to the power.

The surety has nothing to do with making the contract. No consideration moves to or from him. He merely becomes liable upon the contract made by his principal. He is virtually a stranger to the contract, and "whenever it becomes material, strangers may aver and "prove the *real intention* as contra-distinguished from the *intention ex-*"*pressed.*" 2 Phillips Ev., 650, note 487.

The case finally went off on the ground of a subsequent promise to pay, by the endorser, with knowledge of his discharge by reason of the defective demand and notice.

The Court will not suppose from the brevity of the record in stating this branch of the case, that the facts were conceded by the defendant. They were not conceded, as is sufficiently shown by the statement, that "the case was put to the jury, and a verdict found by the plaintiffs."

Record 11.

No point arose on this branch of the case to be presented to this Court, and, therefore, it is stated as briefly as possible, and merely to show how and in whose favor the trial resulted.

Nor will the defense here relied upon for the indorser be prejudiced in the mind of the Court by the fact that the jury found a subsequent promise to pay, notwithstanding the defective protest. It is not pretended that at the time of such subsequent promise, the plaintiff in error had any knowledge of the agreement to make the note payable in New York, by which he was instantly discharged (if, as I have argued, such be the law), nor that he had such knowledge until it was testified to in the progress of the case. He might well have been (as the jury found he was) willing to waive a defective demand, and not willing to consent to a material alteration of his contract. Indeed, he

offered to show that he refused to consent to the very alteration subsequently agreed to between the principals. By a waiver of the defective protest, he merely fixed his liability upon the note as he had indorsed it; by consenting to the agreement he would bind himself to a new contract, with changed, and, perhaps, more onerous obligations.

"The place of payment regulates the rate of interest, and in other "respects may become important. A note payable generally is a very "different instrument from a note given by the same parties and for "the same amount, payable at New York."

Covington vs. Comstock, 14 Pet., 43.

But it is idle to speculate upon what the indorser might have done; the case must rest upon what he did do. It finds no waiver of the effect of the parol agreement.

I have not discussed the question of the right of the maker, without the consent of the indorser, to appoint the place of payment, so far as to make a demand, in conformity with the appointment, a good one.

I do not regard that question as involved in the case, as now presented to this Court. The Circuit Judge regarded the evidence as insufficient for that purpose, and excluded it, to which the plaintiffs below took no exception.

Should the ruling on that point be brought in question, I think the Court will find no difficulty in reaching the conclusion that a reasonable appointment by the maker may be relied upon, and acted on by the holder, in making demand; a request to make presentment at a place, within reasonable limits—an expression of intention to have the necessary funds at such place, may be well conformed to, and acted upon by the holder, without his being guilty of a departure from the rule of diligence that the law imposes upon him, in order to fix the indorser's liability.

It is a question of *diligence*, on the part of the holder, and he may well conform to the reasonable requests or appointments of the maker. On the other hand, it is clear that he cannot, for the purposes of a demand, rely upon *a contract* between himself and the maker, unconsented to by the indorser, that the note should be payable at a particular place; if the contract be valid, the indorser is instantly discharged, if invalid, the holder has no right to rely upon it.

John Pearson vs. Bank of the Metropolis, 1 Pet., 89.
Woodworth vs. Bank of America, 19 Johns., 391.

Here the agreement was intended to affect the terms of the note itself; a demand made upon it was therefor held not sufficient to charge the indorser. If unobjectionable in other respects it ought to have been excluded as an unreasonable appointment, the makers and indorser living in Memphis.

Niagara District Bank vs. Fairman & Co., Tool Manufacturing Co., 31 Barb., 403.

The truth of the alleged parol agreement has never been submitted to a jury, and if a new trial be granted upon the grounds we have urged, it will of course result in a re-trial of the whole case.

Respectfully submitted,

D. K. McRAE,

*For plaintiff in error.*

# Supreme Court of the United States.

**JOSEPH SPECHT,**

PLAINTIFF IN ERROR,

*vs*

**HOWARD, SANGER & CO.,**

DEFENDANTS IN ERROR.

No. 136.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST TENNESSEE.

## ARGUMENT FOR DEFENDANTS IN ERROR

BY QUINTON CORWINE.

McGill & Witherow, Printers, 1107 E street, Washington, D. C.

# Supreme Court of the United States.

JOSEPH SPECHT, Plaintiff in Error,

*vs.* } No. 136.

HOWARD, SANGER & Co., Defendants in Error.

ARGUMENT FOR DEFENDANTS IN ERROR,

BY QUINTON CORWINE.

Defendants in error brought suit against plaintiff in error as indorser of the following-described note:

"NEW YORK, *Sept.* 22, 1866.

"$7,764 18.

"On Dec. 11th, 1866, we promise to pay to the order of Joseph Specht seventy-seven hundred and sixty-four and $\frac{18}{100}$ dollars, value received, with interest from Oct. 12th, 1866. (Signed) WM. JEHLE & BRO.

"Due Dec. 11–14.

"Rev. stamp.

"Indorsed—JOSEPH SPECHT.

"Cr.—Dec. 31st, 1866, $4,000."

At the maturity of said note diligent search and inquiry were made for the makers thereof in the city of New York, but they could not be found. Whereupon said note was duly protested for non-payment on same day, and notice sent to plaintiff in error the following day (Dec. 15, 1866) through the mail.

This note was given in renewal of a former note for the same debt, and, like the former, drawn and indorsed in New York city; but, unlike the former, was not by its terms payable in New York city. (See Record, p. 10, and p. 1 of Plaintiff in Error's brief, herein.)

It will be observed that there is no pretense anywhere disclosed in the record that the payees had notice at any

time of the statement which plaintiff in error offered to prove, viz, that he would not again indorse a note payable in New York. And yet he puts his name on this paper, and gives it to the makers, to be handed to the payees, who receive it without explanation or information that the indorser would not indorse it if made payable in New York.

It was proven on the trial below that plaintiff in error consented to the parol agreement between the makers and holders to make New York city the place of payment at the time the note was drawn; but this the court withdrew, and allowed the case to go to the jury upon the proof of a parol agreement, made subsequently by defendant, to pay the note, with full knowledge of his discharge, upon which promise the jury rendered a verdict for plaintiffs.

These questions now call for the consideration of this court, viz:

1st. Were the demand and notice sufficient to fix the liability of the indorser, irrespective of every other consideration?

2d. Was the agreement between the holders and makers, assented to by the indorser, a material alteration and variation of the original contract, and such as discharged the indorser?

3d. Did the court below err in permitting to go to the jury proof of the indorser's verbal subsequent promise to pay, with knowledge of his discharge?

A promissory note should properly, and generally does, contain the date when given, for how long a time, and at what place payable; and these latter two are as essential to form a perfect note as the names of the parties.

Generally no note is complete in its terms without these elements, and it must follow, therefore, that an obligation, which is complete and absolute in its terms needs not the intervention of a court or jury to determine the respective rights and duties of the parties to it.

But the note in question, being drawn payable generally, was lacking in one of these important particulars, viz, the expressed place of payment. We must assume that the parties,

who are experienced merchants, when they consented to take this note, and fixed the time in which it was to run, also imposed the duty upon the makers of fixing a place of payment. That there was such an understanding, to which the indorser assented, and that the holders made diligent search and inquiry for the makers at the maturity of the note, and that the indorser had due and proper notice of its non-payment and protest, is sufficiently shown by the proof in the record. But this the court refused to allow to go to the jury, wherein we think it erred. It was not an alteration or variation of the contract in any sense, and was not intended or attempted to be used for such purpose, neither was it a cotemporaneous agreement.

The note in itself was not complete, and did not express the original intention of the parties.

The book-keeper of the holders (record, p. 10) testifies that he drew the note, and if the place of payment was not named, it was a clerical error on his part, as William Jehle, one of the makers, had asked to have it so drawn.

"If the instrument obviously and certainly contains only a part of the contract of the parties, the remainder may be supplied verbally, &c. This is not constructing a new bargain, but authenticating and throwing light upon the old." (2 Parsons on Notes and Bills, p. 514, ed. of 1863.)

Parol evidence may show the place where payment was agreed to be demanded, when it does not appear on the face of the note. Such an agreement is a circumstance extrinsic to the contract made by the note. (Pearson *v.* Bank of the Metropolis, 1 Peters, 89.)

A mistake apparent on the face of a note, caused in executing or copying, may be rectified at law by parol evidence. (2 Parsons, *supra.*) Such cases of clerical mistakes will be reformed in equity. (Paysant *v.* Ware, 1 Ala., 171.)

In the construction of contracts the intentions of the parties at the time of contracting should be ascertained. Here there was doubt and uncertainty, and the instrument was imperfect on its face. Clearly, then, the jury could not be enlightened as to the intention of the parties, with-

out oral proof to supply the deficiency. (Dupree *v.* McDonald, 4 Dess. R., 210; Story's Com. on Eq., vol. i, par. 164, 165, 166, and notes.)

See, also, the learned opinion of Mr. Justice Bradley in case of The National Bank of the Metropolis *v.* Kennedy, receiver, &c., but lately decided and not yet reported, wherein the true doctrine is laid down.

But, assuming that there was no understanding as to the place of payment between the parties, then we contend that the demand and notice were sufficient to fix the liability of the indorser, by the well-established rules of the law merchant.

If no place of payment in a note be designated, the law of the place where the contract is made governs its construction, obligation, and place of payment.

Bryant *v.* Eden, 8 Vt., 325.
Bank of Orange County *v.* Colby, 12 N. H., 520.
Sherrill *v.* Hopkins, 1 Cowen, 103.
Fanning *v.* Consequa, 17 Johns., 511.

Where the acceptance of a bill is general, naming no place of payment, the place of payment shall be taken to be the place of contracting the debt.

Don *v.* Lippmann, 5 Clark and Finnelly, House of Lords, 1, 12, 21.
Thompson *v.* Ketcham, 8 Johns., 189.
Pearson *v.* Bank of the Metropolis, 1 Peters, 89.
1 American Lead. Cases, p. 357.
Swift *v.* Tyson, 16 Peters, 1, 18, 19.
Andrews *v.* Pond, 13 Peters, 65.
Story's Confl. Laws, 103.
Also see case Est. of Kohne, Parson's Select Eq. Cases, 399.

Whoever contracts in a particular place, subjects himself to its laws as a temporary citizen. The law of the place of contracting must govern.

From opinion of Justice Martin, cited in Story's Conflict of Laws, p. 238.

Malpica *v.* McKown, 1 La. R., 249 and 254.
Arago *v.* Currell, 1 La. R., 528.
Story's Confl. of Laws, par. 291 *et seq.*, and notes.
Aymar *v.* Sheldon, 12 Wendell, 439.

The moment the note is dishonored and notice of that fact duly given to the *indorser*, the holder's right to sue him is perfect, and this right is not impaired as long as he remains passive.

6 Wendell, p. 613.

It seems to be an undisputed doctrine, with respect to personal contracts, that the law of the place where they are made shall govern in their construction.

Ch. J. Parker in case of Prentiss *v.* Savage, 13 Mass. R., p. 33.
Chapman *v.* Robertson, 6 Paige R., 627.
Bank of U. S. *v.* Daniel, 12 Peters, 32.
Curtis *v.* Leavitt, 15 N. Y., p. 9.
Story on Promissory Notes, par. 339, and notes.

It seems, also, that if the maker of a promissory note resides and has his domicil in one State, and actually dates and makes and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there.

Story on Promissory Notes, par. 236, ed. of 1845.
Hepburn *v.* Toledano, 10 Miller, La., 643.

Or, if the maker has absconded and cannot be found; or if, at the maturity of the note, he has no known residence or place where a presentment can be made; then the holder will, in like manner, be excused from any presentment.

Story Prom. Notes, *ibid.*, *supra.*
Story on Bills, par. 327, 351.
Chitty on Bills, ch. 7, p. 367, (8th ed.;) and ch. 8, p. 360; ch. 10, pp. 485, 524.

Bayley on Bills, ch. 7, par. 1, p. 218, (5th ed.)
Anon., L'd Raym., 743.
Whittier *v.* Graffam, 3 Greenl. R., 82.
Putnam *v.* Sullivan, 4 Mass. R., 45.
Widgery *v.* Munroe, 6 Mass., 449.
Hale *v.* Burr, 12 Mass., 86.
Duncan *v.* McCullough, 4 Serg. & Rawle, 480.
Lehman *v.* Jones, 1 Watts & Serg., 126.
Nolle *v.* Jewett, 10 Miller, La. R., 390.

Here the plaintiff in error indorsed the note in blank, with no qualification or condition, and the law will presume that he knew what he was doing, and elected to be governed by whatever the maker properly did with it. The holders had a right to exact a place of payment, and the makers to assent to it, and it was of no concern to the indorser, so long as the contract was unaltered. His liability did not attach until the makers failed in their obligation, to wit: to pay at maturity and at the place agreed upon.

By indorsing the note in blank he created Wm. Jehle & Bro. his agents, and thus assented to any arrangement they made with, or any disposition they might make of the note. He was well aware of the purpose of the makers, and knew that this note was intended as a renewal of the old note, (which was on its face expressly payable in New York city,) and to secure the same debt. He thus gave expression to his continued and entire confidence in them, and left them free to do as they chose with the paper. He could have qualified his acceptance by requiring presentment and payment at some particular place; but he imposed no restriction on them as to place of payment, and allowed them to take the note, bearing his indorsement in blank, into the market, for their own convenience and benefit, and thus left them free to fix a place of payment. The indorser was legally and seasonably notified of the protest and non-payment of the note, and this was all he was entitled to.

The maker of a note may designate a place of payment or of presentment.

Pearson *v.* Bank of Metropolis, 1 Peters, 89.
State Bank *v.* Hurd, 12 Mass., 172.
Whitwell *v.* Johnson, 17 Mass., 449.
Also, see Opinion of Chancellor Kent in case Woodworth *v.* Bank of America, 19 Johns. R., 391, which is undoubtedly the correct doctrine.

It was a New York contract, and the rate of *interest* was measured by the law of that State.

2 Parson's Notes and Bills, 375.

The general rule is, that the law of the place where the contract is made is to determine the rate of interest, when the contract calls for interest.

2 Kent's Comm., 461, and note *a*.

A promissory note, payable generally, must bear the rate of interest of place where made.

Hawley *v.* Sloo, 12 La. Annual, 815.

In the absence of any fixed place of payment, the holders had a right to expect payment in New York, and they were free to presume that the makers would respond in New York, on the day of the maturity of the note. Failing in which, they exercised all the diligence of inquiry the law would impose on them.

The acceptance being general, payment may be required in any place where the holder shall demand it. This is the doctrine as applicable to bills of exchange.

Story's Conflict of Laws, p. 285, par. 345 *et seq.*

This subject is very ably and fully discussed in Story on Conflict of Laws, commencing with paragraph 342, on p. 283.

Where a demand must be fruitless, the indorser has no right to insist upon a demand upon the maker.

Bond *et al. v.* Farnham, 5 Mass. R., 170.

So where it is agreed between the holder and promisor that the notice may be left at a particular place, not his own place of business or residence, leaving the usual notice at such place is a sufficient presentment. It is no concern of the indorser.

17 Mass. R., 449.

Halliday *v.* Martinet, 20 Johns. R., 168.

But, recurring to the first proposition, we repeat that the note on its face showed a mistake, which the plaintiffs below offered to explain, and which they should have been permitted to explain.

Dean *et al. v.* Lazardi, 22 Miss. R., 424.

Smith's Mercantile Law, p. 266 and notes.

2d. The note being made in renewal, and as an indulgence to the makers, the latter, to save the former any trouble or expense, fixed New York city as the place of payment, and with a view to discount if necessary. Plaintiff in error indorsed the note in New York, and assented to this agreement. Even if this fact had not been disclosed to the holders, they had a right to assume that he knew it, in the absence of any instructions to the contrary. By this the indorser was bound.

But, assuming that he did not know it, was this agreement a material alteration or variation of the original contract, and one such as discharged the indorser? Plainly it was not, unless it was a *material* alteration or variance; and if it affects none of the rights or liabilities of any of the parties to the instrument, and is based on no consideration, it cannot be material: the indorser is not discharged.

Brown *vs.* Pinkham, 18 Pick. R., 172.

To produce a discharge by the variation of a contract, it must be actually varied, and it is not enough to show a mere intention or agreement to vary it, *without operation at law*, even though valid in equity.

2 American Leading Cases, 388.

In general the payee, in suing one who indorsed a note in blank at the time it was given, may show by parol the real nature of the transaction. Hence, though an indorser in blank in legal contemplation writes just what the law presumes he intended to write, still the legal inference does not preclude the parties from proving what their real contract was. For, in a suit between the original parties, it is considered that the blank name means nothing of itself, and its purpose must be shown *aliunde*.

Riley *v.* Gerrish, 9 Cush., 104.
Union Bank *v.* Willis, 8 Met., 504.
Austin *v.* Boyd, 24 Pick., 64, and cases there cited.

The English doctrine goes even further.

Judge Metcalf says, in Sohier *v.* Loring, 6 Cushing, p. 537:

It is settled in England, that a *discharge*, or giving time by a creditor to his principal debtor, will not discharge the surety, if there be an agreement between them that the surety shall not be discharged.

Suppose the court had allowed the testimony of both sides as to the place of payment, &c.: it would then have resulted in a question of fact for the jury, and the weight of which it was strictly within their province to pass upon. In which event, in the light of the record now before this court, the weight of the testimony must have resulted in a verdict for plaintiffs below.

Or, suppose one side had sworn that it was understood to be payable in Memphis, and the other that it was payable in New York: would not the jury have rendered a verdict for plaintiffs below from the weight of evidence and surrounding circumstances?

Suppose the makers had made a memorandum as to place of payment anywhere on the note: would this have affected the character of the paper or the rights or obligations of the parties? Clearly not. The alteration or variation of the contract must be material to have any effect, and it must be an absolute alteration or variation to be material.

Thompson on Bills, chap. 1, p. 69, 2d edit.

But if it was an alteration, it was consented to by the indorser; at least, in the absence of a showing that he did not consent, the court must assume that he recognized the right of either the makers or holders, or both, to fix a place of payment. If no place of payment is fixed, the note is payable everywhere.

Engler *v.* Ellis, 16 Ind., 475.

Attention is called to note 155 of Pothier De Change for a full and lucid discussion of the doctrine of *lex loci contractus.*

It is impossible to realize that the contract was altered or varied in any respect whatever, the force of the obligation impaired, or the rights or duties of the parties abridged or enlarged, or affected in any way.

Stevens *v.* Lloyd, 1 Mo. & M., p. 292.
Arnold *v.* Jones, 2 R. I., p. 345.
Reed *v.* Kemp, 16 Ill., p. 445.

But, in addition to all this, and as more conclusive proof of the intention of the parties to make New York the place of payment, the letter (Rec., p. 9) of the makers, William Jehle & Bro., which was an exhibit to the deposition of Samuel E. Howard, was offered, and this was good, (if the verbal agreement was not,) and can in no sense be tortured into a variation or alteration of the original contract. It was a notification, as well, that they might not meet the note at maturity; in fact it was, to some extent, a waiver of demand and presentment. Indeed it was an advertisement to the holders that the note would not be paid at maturity, unless the makers remitted the money. The language is, "If we *should fail to remit when due, we will certainly* do so at once after the Christmas sales."

Having failed to remit, it was no longer incumbent upon the holders to seek the drawers, because thereby they would have done a vain thing in the presence of the latter and the failure to remit. The rule being, where a demand would be fruitless, the indorser has no right to insist upon a demand upon the maker, &c.

Bond *et al. v.* Farnham, 5 Mass., 170.

3d. Did the court below err in admitting proof of the indorser's subsequent promise to pay? We think not.

Long after the maturity of the note, and when he had full and proper notice of its non-payment and protest, plaintiff in error gave his verbal promise to pay. Proof of this promise was made by defendants in error, to which there was no exception taken or any denial made. Thus, if the demand and notice were imperfectly made, or if the agreement between the makers and holders, to make New York the place of payment, is not good, it could have made no difference, in view of *his subsequent* PROMISE *to pay*, with a full knowledge of his discharge.

Without further argument on this point, which is admitted by the record and plaintiff's brief, and which we think entitled the defendants in error to a verdict, we pass to notice the case as made for plaintiff in error in the brief of his counsel.

On page 2 of his brief, the learned gentleman says: "It will be observed that the agreement was entered into cotemporaneously with, and as a part of the same transaction in which the note in suit was executed and delivered.

"And that its purport was to render this note the same in terms as that for which it was given in renewal. There can be no doubt, therefore, that the agreement was supported by a sufficient consideration, to wit, the surrender and cancellation of the old note. It related to a material part of the contract evidenced by the note. This court has more than once decided that the place of payment was a material part of the note."

Granted, for argument's sake, and then what becomes of his theory? Suppose the court below had admitted his proof, what would it have been? Simply the testimony of himself, to show that he told one of the makers, a few days prior to the making of the new note, that he would not indorse another note payable in New York, as against the testimony of three witnesses, who say that the positive understanding of all paties was that the note was to be paid in New York. The note, as it is, was taken to him in

New York, and he indorsed it, without a question, at least so far as the payees were concerned, and certainly without qualification, and delivered it in blank to the makers, leaving them to do with it as they chose. They were thus constituted his agents. The court very properly ruled his evidence out. The place of payment is a most material part of the note, *where it is embodied in the note originally*, as the cases cited by counsel for plaintiff in error decide.

By our law it is not essential that any place of making or of payment should be specified on the face of the note, unless specially provided by statute.

Bayley on Bills, pp. 29, 30, chap. 1, par. 9, 5th ed.
Thompson on Bills, chap. 1, p. 69, 2d ed.
Chitty on Bills, chap. 5, pp. 172, 174. (8th ed.)

And, if not stated, the note is payable everywhere.
Engler *v.* Ellis, 16 Ind., p. 475.

The case of Dobbins & Evans *v.* Bradley, (17 Wend., 422,) cited by him, contains none of the elements of this case, and can have no application to it, as his own statement of it shows. There the *written* authority, of which all parties had notice, directed that the notes should be drawn payable at a particular place; but nevertheless they were drawn payable generally. That was undoubtedly a variance from the guarantee, and discharged the defendant.

The case of Sturgis & Hale *v.* Williams, (9 O., N. S., 443,) cited by him, is likewise inapplicable here. There the makers, after indorsement, interlined the place in the *body* of the note without the knowledge of the indorsers and with the knowledge of the payees. We admit that such was a material alteration of the written contract, and contrary to the *agreement of all parties.*

The attempt of counsel for plaintiff in error to claim, that his client was entitled to use the parol evidence offered by plaintiffs below, to establish the parol agreement as to the place of payment, and that it was error for the circuit judge to rule it out, seems to us to be founded

in an error of fact. He objected to the introduction of the evidence, and the court sustained his objection. It nowhere appears that he withdrew his objection at any stage of the trial. It is true, when he first made the objection the court overruled it, but subsequently it was sustained, and the record says he excepted to the act of the court in sustaining his motion. That exception came too late. It is hardly correct practice, we submit, for connsel to object to the introduction of evidence, and, after his objection is sustained, to except to the action of the court in thus sustaining his objection. In the first place, he satisfies the court that his objection is well taken, and then complains of the court for agreeing with him. We cannot think this is error. None of the cases he cites are, in fact or in principle, like this one. The plaintiffs below did not ask to have the evidence withdrawn, but, according to the record, it was withdrawn by the court, under the inspiration of the exception taken by plaintiff in error to its introduction.

The more recent decisions of the supreme court of New York would seem to be adverse to this doctrine; but a close examination of them will show that they are not. The principle on which they rest is, that the indorser of a note is to be likened unto the drawer of an order. His indorsement is an order in favor of the drawee of the note on the makers, to be presented at the place of residence or business of the latter. All parties are advised of and understand where the drawers do reside, and must govern themselves accordingly. (See Taylor *v.* Snyder, 3 Denio, 145.)

The most of the more recent cases in that State proceed upon that theory. Now, we submit that this is not the law-merchant in respect to negotiable paper. An *order* is a mere *chose in action*, which has none of the elements of a negotiable instrument. The one fixes the place of performance of the contract at the residence of the party upon whom drawn, whereas the other fixes it at the place where the contract is made, in the absence of any express written direction to the contrary.

On the whole, we respectfully submit, that there is nothing in the errors assigned which can entitle the plaintiff in error to a new trial, or that would justify a reversal of the judgment below; and we therefore ask its affirmance.

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